Office - Supreme Court, U.S.
FILED
NOV 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

PETITIONER'S BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 34

JAMES F. SMITH
District Attorney

STEVEN L. BERNARD
Chief Trial Deputy

Attorneys for Petitioner

450 South Fourth Avenue
Brighton, Colorado 80601
Telephone: (303) 659-7720

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED FOR REVIEW

When both the defendant and the trial court concede during a hearing on a motion to suppress that the credibility of the affiant to a search warrant's affidavit is not at issue, is the trial court's order requiring the prosecution to reveal a confidential informant's identity beyond the scope of the Fourth Amendment?

TABLE OF CONTENTS

Page(s)

Question Presented for Review i

Table of Authorities ii

Opinion Which the Petitioner Seeks to Review 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

Summary of the Argument 7

Argument 8

Conclusion 23

TABLE OF AUTHORITIES

CASES

Aguilar v. Texas, 378 U. S. 108 (1964) 13, 14, 18, 22, 23

Burdeau v. McDowell, 256 U. S. 465 (1921) 9, 10

Commonwealth v. Bradshaw, 434 A. 2d 181 (Pa. Super. 1981) 17

Commonwealth v. Brown, 429 N. E. 2d 47 (Mass. App. 1981) 16

Coolidge v. New Hampshire, 403 U. S. 443 (1971) 10

Franks v. Delaware, 438 U. S. 154 (1978) 14, 15, 17, 18, 20, 22, 23

Illinois v. Gates, 76 L. Ed. 2d 527 (1983) 13, 14, 22, 23

In re Search Warrant Dated July 4, 1977, 667 F. 2d 117 (C. A. D. C. 1981), *cert. den.* 456 U. S. 926 (1982) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Laque v. State, 627 S. W. 2d 781 (Tex. App. 1982) 17

Lee v. State, 661 P. 2d 1345 (Okl. Cr. App. 1983) 17

Mapp v. Ohio, 367 U. S. 643 (1961) 9

McCray v. Illinois, 386 U. S. 300 (1967) 13, 14, 18, 20, 21 22, 23

Misenheimer v. State, 268 Ind. 274, 374 N. E. 2d 523 (1978) 16

People v. Alfinito, 264 N. Y. S. 243, 211 N. E. 2d 644 (1965) 17

People v. Brumfield, 55 Ill. Dec. 687, 426 N. E. 2d 1012 (1981) 16

People v. Johnson, 83 Mich. App. 1, 268 N. W. 2d 259 (1978) 16

People v. Nunez, 658 P. 2d 879 (Colo. 1983) 1

Roviaro v. United States, 353 U. S. 53 (1957) 11, 12, 20, 23

Scher v. United States, 305 U. S. 251 (1938) 12

Schmid v. State, 615 P. 2d 565 (Alaska 1980) 16

Schneider v. State, 269 Ark. 245, 599 S. W. 2d 730 (1980), *cert. den.* 449 U. S. 1124 (1981) 16

Spinelli v. United States, 393 U. S. 410 (1969) 13, 14, 18, 22, 23

State v. Babbit, 363 So. 2d 690 (La. 1978) 16

State v. Boyd, 224 N. W. 2d 609 (Ia. 1974) 16

TABLE OF AUTHORITIES—Continued

Page(s)

State v. Boyd, 492 S. W. 2d 787 (Mo. 1973), *cert. den.* 414 U. S. 1069 (1973) 17

State v. Brown, 618 S. W. 2d 365 (Tenn. Cr. App. 1981) 17

State v. Burnett, 42 N. J. 377, 201 A. 2d 39 (1965) 17

State v. Butler, 207 Neb. 760, 301 N. W. 2d 332 (1981) 17

State v. Cervantes, 92 N. M. 643, 593 P. 2d 648 (1979) 17

State v. Chase, 439 A. 2d 526 (Me. 1982) 16

State v. Hermerding, 5 Kan. App. 797, 626 P. 2d 210 (1981) 16

State v. Keener, 110 Ariz. 462, 520 P. 2d 510 (1974) 16

State v. Larson, 26 Wash. App. 564, 613 P. 2d 542 (1980) 17

State v. Luciow, 308 Minn. 6, 240 N. W. 2d 833 (1976) 17

State v. Mannhalt, 658 P. 2d 15 (Wash. App. 1983) 17

State v. Mosley, 412 So. 2d 527 (La. 1982) 16

State v. Robish, 214 Neb. 190, 332 N. W. 2d 922 (1983) 16

State v. Spero, 117 N. H. 199, 371 A. 2d 1155 (1977) 17

State v. Stickelman, 207 Neb. 429, 299 N. W. 2d 520 (1980) 17

State v. White, 391 A. 2d 291 (Me. 1978) 16

State v. Zamora, 430 So. 2d 274 (La. App. 1983) 16

Taylor v. State, 604 S. W. 2d 175 (Tex. Crim. App. 1980) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Theodor v. Superior Court, 104 Cal. Rptr. 226, 501 P. 2d 234 (1972) ____ 16

Thornton v. State, 390 So. 2d 1093 (Ala. Cr. App. 1980), *cert. den.* 450 U. S. 998 (1980) ____ 16

United States v. Arrington, 618 F. 2d 119 (C. A. 5 1980), *cert. den.* 449 U. S. 1086 (1981) ____ 15

United States v. Ballistreri, 551 F. Supp. 275 (D. C. Wis. 1982) ____ 16

United States v. Barnes, 604 F. 2d 121 (C. A. 2 1979), *cert. den.* 446 U. S. 907 (1980) ____ 15

United States v. Brian, 507 F. Supp. 761 (D. C. R. I. 1981) ____ 16

United States v. Burke, 490 F. Supp. 855 (D. C. Fla. 1980) ____ 16

United States v. Carmichael, 489 F. 2d 983 (C. A. 7 1973) ____ 16

United States v. Chesher, 678 F. 2d 1353 (C. A. 9 1982) ____ 16

United States v. DePalma, 461 F. Supp. 800 (D. C. N. Y. 1978) ____ 16

United States v. Dorfmann, 542 F. Supp. 345 (D. C. Ill. 1982) ____ 16, 17

***United States v. Edwards*, 602 F. 2d 458 (C. A. 1 1979) ____ 15**

***United States v. Garcia*, 593 F. 2d 77 (C. A. 8 1979) ____ 16**

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Janis, 428 U.S. 433, 455 (1976) 10

United States v. Luscher, 614 F. 2d 1164 (C. A. 8 1980), *cert. den.* 446 U. S. 939 (1980) 16

United States v. Marcello, 508 F. Supp. 586 (D. C. La. 1981) 16

United States v. Metz, 608 F. 2d 147 (C. A. 5 1979) 16

United States v. Phillips, 563 F. Supp. 267 (D. C. La. 1983) 16

United States v. Schauble, 647 F. 2d 113 (C. A. 10 1981) 16

United States v. Skramstad, 649 F. 2d 1259 (C. A. 8 1981) 16

United States v. Smith, 635 F. 2d 1329 (C. A. 8 1980) 16

United States v. Southard, 700 F. 2d 1 (C. A. 1 1983) 15

United States v. Weingartner, 485 F. Supp. 1167 (D. C. N. J. 1979) 16

United States v. Wuagneux, 683 F. 2d 1343 (C. A. 11 1982) 16

Walter v. United States, 447 U. S. 649, 656 (1980) 10

Weeks v. United States, 232 U. S. 383 (1914) 8, 9

OTHER

28 U. S. C. A. Sec. 1257(3) 2

C. R. S. 1973, § 12-22-309 3

TABLE OF AUTHORITIES—Continued

Page(s)

C. R. S. 1973, § 18-18-105(2)(a) 3

U. S. Const. amend. IV 2, 8, 9, 10, 14, 19, 20, 21, 22, 23

U. S. Const. amend. XIV 10

No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

PETITIONER'S BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 34

OPINION WHICH THE PETITIONER SEEKS TO REVIEW

The petitioner seeks review of the Colorado Supreme Court's decision in *People v. Nunez*, 658 P. 2d 879 (Colo. 1983). The text of that opinion is contained in the Joint Appendix at 134-139.

JURISDICTION

Pursuant to 28 U. S. C. A. Sec. 1257(3), the petitioner sought this Court's review by a Petition for a Writ of Certiorari. The Colorado Supreme Court entered its decision on February 22, 1983. The petitioner filed its petition on April 22, 1983. The petitioner's discussion of why this Court has jurisdiction to decide the issue raised by this case is contained in the Petition for a Writ of Certiorari at 1-9.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following portion of the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . .

STATEMENT OF THE CASE

On November 7, 1981, pursuant to a warrant Denver Police officers and Adams County Sheriff's deputies searched the house located at 8690 Norwich Street, unincorporated Adams County, Colorado. During this search, these officers searched the person of the defendant, Antonio Nunez. The officers discovered fifteen balloons in Mr. Nunez' pockets, which contained a substance later analyzed to be heroin. Based upon this evidence, the prosecution charged Mr. Nunez with Possession of

a Schedule I Controlled Substance, contrary to C.R.S. 1973, § 12-22-309, as amended, and C.R.S. 1973, § 18-18-105 (2) (a), as amended. (Joint Appendix, hereinafter "J.A.," 10-13, 68-72).

Through counsel, the defendant filed a motion to suppress the heroin seized from him and a motion requesting that the court order the prosecution to disclose the name of a confidential informant upon whose statements the search warrant executed on November 7, 1981, was partially based. (J.A. 3-9, 13-20). On September 9, 1982, the Adams County District Court held a hearing on those motions. The affidavit for the warrant was introduced at the hearing. (J.A. 29). It contained information provided by three separate confidential informants. (J.A. 3-7). Defense counsel stated that he only sought the disclosure of one informant, alleging that only that person's credibility was in issue. (J.A. 28).

The affiant, Denver Police Sergeant Don DeNovellis, had written that the informant in question had told Sergeant DeNovellis that the informant had seen the defendant with a "large amount of heroin" within twenty-four hours of November 7, 1981. The informant said that the defendant had stated that he had just returned from Mexico, where he had purchased five ounces of heroin. The informant watched the defendant dilute the heroin and then package it in balloons. Sergeant DeNovellis wrote that the informant recognized heroin because he/she had previously used it. Sergeant DeNovellis also noted that the informant had previously provided him with reliable information that had led to seizures of heroin. (J.A. 3-7).

Defense counsel conceded that the credibility of the affiant, Sergeant DeNovellis, was not at issue. Near the beginning of the suppression hearing, defense counsel stated:

> We're not questioning the affiant's credibility, Sergeant DeNovellis' credibility . . . (J.A. 31).

Later in that hearing, he stated:

> My statement about Sergeant DeNovellis—I have no information at this point or presented to the court he intentionally made any misstatements. I think if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would go to the heart of the motion to suppress and, second of all, that there was recklessness on the part of the affiant not verifying the information or checking out the information. (J.A. 34).

Defense counsel argued that the informant's identity should be revealed so that he could subpoena the informant to testify at the suppression hearing. (J.A. 31). The trial court then said:

> I'm not concerned about Detective DeNovellis' credibility. I don't think that's in question at all. (J.A. 36).

The defendant testified in order to support his attorney's allegations. The defendant stated that on October 31, 1981, he had driven his motor home from his house on Norwich Street to the mountains in order to hunt. He said that he was accompanied by his father, his son, his nephew and a friend. The defendant stated that he had returned from his trip in the early morning hours of November 6, 1981. While he spent all of that day at the Norwich Street address, he insisted that no one visited his home except for his immediate family and at least

eight other relatives. He denied that he had traveled to Mexico between October 31 and November 6. (J.A. 43-46). On cross-examination the defendant admitted that he was awaiting trial in Denver on a charge of intimidating a witness. (J.A. 50-51). The defense did not present the testimony of any of the people who allegedly went hunting with the defendant or of anyone who had been in his home on November 6, 1981.

The prosecution argued that the court should not order the police to disclose the informant's identity. First, the prosecutor mentioned that the disclosure of the informant's identity could endanger that person's safety. (J.A. 40). Second, he pointed out that defense counsel was not questioning the affiant's credibility, but rather the credibility of the informant. Third, he observed that the prosecution would not use the informant as a witness at trial because the informant was not a witness to the incident upon which the charge was based. Fourth, he submitted that there was no disagreement between the informant's statements and the defendant's testimony. He concluded by stating that defense counsel had not established that disclosure of the informant's identity would be essential to the motion to suppress. (J.A. 73-75).

After hearing arguments of both counsel, the trial court found that disclosure of the informant's identity was necessary to resolve the motion to suppress and ordered the prosecution to reveal the informer's name. (J.A. 76-77). The prosecutor subsequently informed the court that he would not disclose the informant's identity because he was concerned for his/her safety. (J.A. 82-83). On October 7, 1982, the trial court, in a written opinion, found that disclosure of the informant was essential to

the resolution of the case. Because the prosecution refused to disclose the informant's identity, the trial court suppressed the evidence taken from the defendant in the search that occurred on November 7, 1981. (J.A. 91-93).

Pursuant to the Colorado Appellate Rules, the prosecution filed an Interlocutory Appeal in the Colorado Supreme Court. (J.A. 94-96). As in the trial court, the prosecution argued that, because the defendant had conceded that the affiant's credibility was not in issue, the trial court could not order the prosecution to disclose the informant's name for purposes of the suppression hearing. The government urged that the only issue at such a suppression hearing was whether the affiant lied or recklessly disregarded the truth. (J.A. 104-111, 131-134).

On February 22, 1983, the Colorado Supreme Court affirmed the trial court's decision. In doing so, that Court held:

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People v. Dailey*. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." (J.A. 138).

The State of Colorado then filed a Petition for a Writ of Certiorari in this Court. This Court granted that Writ on October 3, 1983.

SUMMARY OF THE ARGUMENT

The government has a qualified privilege to withhold the identity of a confidential informant. A court may override that privilege and order the prosecution to disclose the informant's identity if that information will be relevant to a case or necessary for its just resolution. An accused's request for disclosure usually arises in two situations. First, if an informant was a witness to the event upon which a criminal charge is later based, a court may order disclosure of that person's identity because he may be the source of potentially exculpatory evidence.

Second, a defendant may seek the identity of a confidential informant who provided the police with information that subsequently appeared in a search warrant. In this situation, if the accused establishes, by a preponderance of the evidence, that the *affiant* lied or recklessly disregarded the truth in relating what the informant said, then the court may strike the sections of the affidavit based upon the questionable statements and evaluate the remainder to see if it establishes probable cause. In order to make this determination, a court, after a proper demonstration by the accused that brings the *affiant's* credibility into issue, may order disclosure of the informant's identity so that he can be subpoenaed to testify.

There must be an attack upon the *affiant's* credibility before the informant can be disclosed. This requirement is based upon the purposes behind suppression hearings. Unlike the situation where an informant has witnessed a crime and may, therefore, know of relevant evidence, when an accused seeks to suppress evidence, he seeks to suppress the truth. The purpose of a suppression

motion is to remove probative evidence from the jury's deliberation as a sanction for police misconduct. If the police act appropriately, then suppression of the evidence is inappropriate. If an *informant* lies or recklessly disregards the truth, but the police then act carefully and responsibly, suppression is an improper remedy because it will not discourage police misfeasance. In this scenario, the wrongdoing, if any, comes from a private source: the informant. The Fourth Amendment's protections do not apply to such private sources.

In the case at bar, defense counsel readily conceded that the affiant's credibility was not at issue. That concession mooted his argument, because it established that there was no basis for ordering the prosecution to disclose the informant's identity or for suppressing the prosecution's evidence. Since there was no police misconduct in developing the search warrant, therefore, there was no reason for the trial court to impose any sanctions.

ARGUMENT

The Colorado Supreme Court's decision in this case incorrectly extends this Court's decisions that involve confidential informants beyond the scope of state action and permits an accused to obtain the identity of a confidential informant by presenting any evidence at all.

In 1914, this Court established the "exclusionary rule," a legal device designed to deter arbitrary police invasion of the privacy of American citizens. *Weeks v.*

United States, 232 U.S. 383 (1914). In *Weeks,* Justice Day described the scope of the exclusionary rule at 391:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

This position that the purpose of the exclusionary rule was to prevent government officials from capriciously interfering with established privacy interests was reaffirmed in *Mapp v. Ohio,* 367 U.S. 643 (1961) at 656:

> [T]he purpose of the exclusionary rule "is to deter —to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."

While it is clear that the exclusionary rule was forged to discourage unconstitutional searches and seizures, it is equally obvious that the exclusionary rule, and the Fourth Amendment from which it sprang, apply only to the conduct of police officers and government agents. It does not regulate the acts of a private person who wrongly invades another's home, nor does it require a court to exclude from trial evidence seized by a private person, even if that seizure would, if accomplished by a police officer, otherwise automatically result in the suppression of that evidence. In other words, because the Fourth Amendment was only written to control the excesses of government, it does not apply to the excesses of private citizens.

Beginning with *Burdeau v. McDowell,* 256 U.S. 465 (1921), this Court has firmly stated that the Fourth

Amendment does not apply to the actions of citizens themselves. This Court held at 475:

> The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, *and was not intended to be a limitation upon other than governmental agencies* . . .
>
> It is manifest that there was no invasion of the security provided by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. [Emphasis supplied].

Although *Burdeau* was decided over sixty years ago, the principle that it announced is healthy. In *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), this Court again applied that standard at 488:

> The exclusionary rules were fashioned "to prevent, not to repair," and their target is *official misconduct* . . . but it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly applicable . . . it must be upon the basis that some type of unconstitutional *police conduct* occurred. [Emphasis supplied; citations omitted].

Accord: United States v. Janis, 428 U.S. 433, 455 (1976); *Walter v. United States,* 447 U.S. 649, 656 (1980).

When a police officer incorporates statements from a confidential informant into a search warrant's affidavit, the resulting document combines the issues discussed above. On one hand, the search conducted by the police pursuant to the warrant is clearly "state action" that may

trigger the application of the exclusionary rule. However, on the other hand, if the confidential informant, and not the police, indulges in some misconduct, then the exclusionary rule cannot be applied to the fruits of the search because the source of the impropriety was not a government agent. When, as in the case at bar, an accused only argues, and a court only finds, that the alleged unconstitutional invasion of his privacy occurred because a confidential informant lied or recklessly disregarded the truth, then a court may not use the exclusionary rule to bar the prosecution from introducing at trial evidence seized in that search.

Confidential informants are a fact of a policeman's existence. They often provide the police with important information about crime. However, many informants speak to the police only if the officers promise them that their identities will be concealed. This bargain is mutually beneficial. The police receive tips that may be the only information available to solve a crime or apprehend a criminal. In exchange, the informant remains unnamed and unknown. In some situations, that anonymity may protect the informant's life.

In *Roviaro v. United States,* 353 U.S. 53 (1957), this Court recognized and approved of an "informer's privilege." Justice Burton described the rationale for that privilege at 59:

> The purpose of the privilege is the furtherance and the protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowlege of the commission of crimes to law enforcement officials, and by preserving their anonymity, encourages them to perform that obligation.

However, this Court recognized that this privilege is not absolute. If a trial court finds that disclosure of an informer's name would be helpful to an accused's defense, or if disclosure were necessary to the just resolution of a case, then that court could order the state to relinquish the informer's identity.

While, in the appropriate case, justice demands that an accused discover the name of his accuser, this Court has indicated that trial judges should not treat the "informer's privilege" lightly. In *Roviaro* at 61, footnote 9, this Court quoted, with approval, *Scher v. United States*, 305 U.S. 251 (1938):

> [P]ublic policy *forbids* disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an *officer's good faith*. [Emphasis supplied].

Scher indicates that unless there is a proper demonstration by an accused that he needs to know who the informant was in order to prepare his case, a court *cannot* order the prosecution to reveal the informer's name.

A defendant's request to learn an informant's identity normally arises in two situations. First, an informant may have been a participant in or a witness to the event upon which a criminal charge has been based. In that factual framework, courts frequently order the state to tell the accused the informer's name because the informer may possess exculpatory evidence. The issue presented, therefore, is one of guilt or innocence. The case at bar does not involve this situation.

Second, an informant may have provided the police with information that, either alone or when combined

with other facts, establishes probable cause for the police to arrest someone or to search that person's house or possessions. Before 1983, if this information had been incorporated into an affidavit for a search warrant, it had to satisfy the two-pronged test that this Court established in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). The purpose of the *Aguilar-Spinelli* test was to require the police affiant to include enough reliable information in the affidavit to assure a reviewing magistrate that the police were not inventing "facts" so that they could obtain judicial approval to search a suspect's home and thereby unjustifiably invade his privacy.

In 1983, this Court altered the *Aguilar-Spinelli* standard in *Illinois v. Gates,* 76 L. Ed. 2d 527 (1983). Justice Rehnquist wrote that *Aguilar-Spinelli's* two-pronged test was too rigid. This Court held that a judge who reviews an affidavit that contained statements made by a confidential informant should examine the "totality of the circumstances" described in the affidavit in order to determine if it contained probable cause to believe that evidence of a crime was located in the place that the police wanted to search. Justice Rehnquist stated that the reviewing magistrate should use common sense when he decided whether to issue the warrant.

The *Aguilar-Spinelli* test did not resolve the question of whether an accused could discover the name of the informant who supplied information included in a search warrant's affidavit. In *McCray v. Illinois,* 386 U.S. 300 (1967), an accused sought the name of an informant who had provided a police officer with information that led to the accused's warrantless arrest. In upholding the trial

judge's decision to deny that request, this Court observed that when a defendant at a suppression hearing seeks the name of an informant who provided information to the police that led to the seizure of evidence from him, he seeks to avoid his guilt.

This Court recognized in *McCray* that the purpose of the suppression hearing that involves a confidential informant is to determine if the *police* have violated the Fourth Amendment. Justice Stewart, quoting New Jersey's Chief Justice Weintraub, underscored this position at 307-308:

> [T]he magistrate is concerned, ***not with whether the informant lied,*** but with whether the *affiant* is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the *affiant,* he may require that the *informant* be identified or even produced. [Emphasis supplied].

In *Franks v. Delaware,* 438 U.S. 154 (1978), this Court held that an accused, at a motion to suppress, could attack the veracity of the affiant to a search warrant's affidavit. Justice Blackmun wrote that the purpose of this "veracity attack" was to prevent the police from misleading a reviewing magistrate and to protect the Fourth Amendment rights of citizens. When combined with *Aguilar-Spinelli* or *Gates, Franks* provides an opportunity for both courts and defendants to assure themselves that police affiants have told the truth in their affidavits.

When an accused seeks to attack a warrant in this situation, the only reason upon which a court can rely when it orders the prosecution to disclose an informant's identity is that the accused has made an adequate factual

demonstration that the police-affiant lied or recklessly disregarded the truth. Without that showing, this Court's decisions have established that a judge cannot order the state to reveal an informer's name.

While *Franks* at 170 left open the issue of whether an informant's identity should be disclosed *after* an accused has made a proper demonstration that there were falsehoods in an affidavit, this Court clearly set out what the fundamental elements of that demonstration must be. Justice Blackmun described those components at 171:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. . . . Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is *only of the affiant, not of any nongovernmental informant.* [Emphasis supplied].

This Court's position that a veracity attack only involves a police-affiant's, not an informant's, credibility, has been echoed in state and federal courts in cases that have been decided both before and after *Franks*. *In re Search Warrant Dated July 4, 1977,* 667 F. 2d 117 (C.A. D.C. 1981), *cert. den.* 456 U.S. 926 (1982); *United States v. Southard,* 700 F. 2d 1 (C.A. 1 1983); *United States v. Edwards,* 602 F. 2d 458 (C.A. 1 1979); *United States v. Barnes,* 604 F. 2d 121 (C.A. 2 1979), *cert. den.* 446 U.S. 907 (1980); *United States v. Arrington,* 618 F. 2d 119 (C.A. 5 1980), *cert. den.* 449 U.S. 1086 (1981); *United*

States v. Metz, 608 F. 2d 147 (C.A. 5 1979); *United States v. Carmichael*, 489 F. 2d 983 (C.A. 7 1973); *United States v. Skramstad*, 649 F. 2d 1259 (C.A. 8 1981); *United States v. Smith*, 635 F. 2d 1329 (C.A. 8 1980); *United States v. Luscher*, 614 F. 2d 1164 (C.A. 8 1980), *cert. den.* 446 U.S. 939 (1980); *United States v. Garcia*, 593 F. 2d 77 (C.A. 8 1979); *United States v. Chesher*, 678 F. 2d 1353 (C.A. 9 1982); *United States v. Schauble*, 647 F. 2d 113 (C.A. 10 1981); *United States v. Wuagneux*, 683 F. 2d 1343 (C.A. 11 1982); *United States v. Phillips*, 563 F. Supp. 267 (D.C. La. 1983); *United States v. Ballistreri*, 551 F. Supp. 275 (D.C. Wis. 1982); *United States v. Dorfmann*, 542 F. Supp. 345 (D.C. Ill. 1982); *United States v. Marcello*, 508 F. Supp. 586 (D.C. La. 1981); *United States v. Brian*, 507 F. Supp. 761 (D.C. R.I. 1981); *United States v. Burke*, 490 F. Supp. 855 (D.C. Fla. 1980); *United States v. Weingartner*, 485 F. Supp. 1167 (D.C. N.J. 1979); *United States v. DePalma*, 461 F. Supp. 800 (D.C. N.Y. 1978); *Thornton v. State*, 390 So. 2d 1093 (Ala. Cr. App. 1980), *cert. den.* 450 U.S. 998 (1980); *Schmid v. State*, 615 P. 2d 565 (Alaska 1980); *State v. Keener*, 110 Ariz. 462, 520 P. 2d 510 (1974); *Schneider v. State*, 269 Ark. 245, 599 S.W. 2d 730 (1980), *cert. den.* 449 U.S. 1124 (1981); *Theodor v. Superior Court*, 104 Cal. Rptr. 226, 501 P. 2d 234 (1972); *People v. Brumfield*, 55 Ill. Dec. 687, 426 N.E. 2d 1012 (1981); *Misenheimer v. State*, 268 Ind. 274, 374 N.E. 2d 523 (1978); *State v. Boyd*, 224 N.W. 2d 609 (Ia. 1974); *State v. Hermerding*, 5 Kan. App. 797, 626 P. 2d 210 (1981); *State v. Zamora*, 430 So. 2d 274 (La. App. 1983); *State v. Mosley*, 412 So. 2d 527 (La. 1982); *State v. Babbit*, 363 So. 2d 690 (La. 1978); *State v. Chase*, 439 A. 2d 526 (Me. 1982); *State v. White*, 391 A. 2d 291 (Me. 1978); *Commonwealth v. Brown*, 429 N.E. 2d 47 (Mass. App. 1981); *People v. John-*

son, 83 Mich. App. 1, 268 N.W. 2d 259 (1978); *State v. Luciow,* 308 Minn. 6, 240 N.W. 2d 833 (1976); *State v. Boyd,* 492 S.W. 2d 787 (Mo. 1973), *cert. den.* 414 U.S. 1069 (1973); *State v. Robish,* 214 Neb. 190, 332 N.W. 2d 922 (1983); *State v. Butler,* 207 Neb. 760, 301 N.W. 2d 332 (1981); *State v. Stickelman,* 207 Neb. 429, 299 N.W. 2d 520 (1980); *State v. Spero,* 117 N.H. 199, 371 A. 2d 1155 (1977); *State v. Burnett,* 42 N.J. 377, 201 A. 2d 39 (1965); *State v. Cervantes,* 92 N.M. 643, 593 P. 2d 648 (1979); *People v. Alfinito,* 264 N.Y.S. 243, 211 N.E. 2d 644 (1965); *Lee v. State,* 661 P. 2d 1345 (Okl. Cr. App. 1983); *Commonwealth v. Bradshaw,* 434 A. 2d 181 (Pa. Super. 1981); *State v. Brown,* 618 S.W. 2d 365 (Tenn. Cr. App. 1981); *Laque v. State,* 627 S.W. 2d 781 (Tex. App. 1982); *Taylor v. State,* 604 S.W. 2d 175 (Tex. Crim. App. 1980); *State v. Mannhalt,* 658 P. 2d 15 (Wash. App. 1983); *State v. Larson,* 26 Wash. App. 564, 613 P. 2d 542 (1980).

The analysis of these cases was perhaps best summarized in *United States v. Dorfmann, supra,* at 366:

> The fact that a third party lied to the affiant, who in turn included the lies in a warrant affidavit, does not constitute a *Franks* violation. A *Franks* violation occurs *only* if the affiant knew the third party was lying, or if the affiant proceeded in reckless disregard of the truth. Therefore, *allegations that hearsay contained in a warrant application is false, or that an informant whose story was recited by an affiant who was lying, are insufficient to require a Franks hearing,* since the falsity or recklessness alleged is not that of the affiant, but of a third party. [Emphasis supplied].

Aside from Colorado, research has not revealed *any* jurisdiction that permits an accused to attack only an informant's credibility at a veracity hearing and then ask a

trial court to order the prosecution to disclose the informant's identity.

There are at least two reasons why this Court in *McCray* and *Franks* limited the situations in which an accused could successfully request and obtain an informer's name. First, if a veracity attack is not limited to the affiant, an accused will frequently present unverifiable evidence that the informant has lied. As this Court recognized in *McCray*, at 306:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the state cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted.

The case at bar presents exactly the scene that this Court feared and predicted in *McCray*. Armed with an affidavit that complied with both the *Aguilar-Spinelli* test and the newer *Gates* standard, the police searched the defendant's home and person and took from him fifteen balloons that contained heroin. Clearly, the informant had not only been proved reliable in the affidavit, but the subsequent search by the police further corroborated the informant's reliability when they discovered heroin, contained in balloons, on the defendant's person. Yet, at the motion to suppress, the defendant said that the informant could not have seen what the informant stated that he or she saw. The defendant then testified that he

did not know what heroin was, although the police had taken a large amount of it from his own pocket.

The danger of not limiting a veracity challenge to the affiant's credibility is clear. If an accused can attack an informant's statements, then only the human imagination can limit the testimony about the informant that the accused could present. Because, unlike an officer-affiant, an informer is not available for consultation or testimony during a suppression hearing, it would be difficult, if not impossible, to refute even the most bizarre defense allegations.

The second reason for limiting disclosure is, as stated above, that the exclusionary rule only applies to action taken by government agents. If there is no allegation of official misconduct, then the Fourth Amendment's sanctions cannot be triggered. As the long list of cases cited above indicates, even if an informant intentionally lies, a trial court reviewing an affidavit should not, and cannot, taken any action against the state unless the police-affiant knowingly or recklessly participated in that lie. In order to convince a court to order the prosecution to disclose the informant's name, a defendant must establish some police misconduct that can only be properly investigated by questioning the informant.

Doubtless, the defendant will argue that the informant's identity should be revealed so that defense counsel can question him to determine if the affiant lied or recklessly disregarded the truth. However, this argument places the cart before the horse. Instead of first establishing that there is an adequate basis to believe that the affiant lied or recklessly disregarded the truth, the de-

fendant would ask a trial court to reveal the informer's name so that the defendant can *then* determine if there has been police misconduct. This proposed procedure is far removed from the substantial preliminary showing that this Court required in *Franks*.

In this case, the Colorado Supreme Court's decision extended the reach of the Fourth Amendment into a private area that this Court has repeatedly found to be outside of the scope of the exclusionary rule. In its opinion, the Colorado Supreme Court held:

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People v. Dailey*. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the *informant's* perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the *informant*." . . . When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies of sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. [Emphasis supplied; citation omitted]. (J.A. 138).

This decision is clearly contrary to *McCray*, *Franks* and the list of decisions cited above.

The purpose of *Roviaro*, *McCray* and *Franks* was to protect an accused from police misconduct while preserving for the police an important source of information. The process that those cases established was not crafted to act as a discovery tool, nor was it meant to permit de-

fendants to obtain the name of every informant that the police have ever used. Those cases recognize that the purpose of a "veracity hearing" was only to test the honesty of police-affiants. The holding in this case not only "polices the police," but it tries to make the Fourth Amendment an instrument to control a private citizen's behavior. Obviously, the Fourth Amendment does not, and cannot, go that far.

McCray made it clear that an accused files a motion to suppress items that were seized in a search conducted pursuant to a warrant in order to avoid his guilt. Using that warrant, the police have taken items that may be damning evidence that will be introduced at the accused's trial. The most popular shield that a defendant can raise to avoid the thrust of that evidence is the exclusionary rule. Since the *only* purpose of the exclusionary rule is to deter official misconduct, the Colorado Supreme Court erred when it held that the exclusionary rule could be applied to sanction non-governmental behavior.

The ruling in this case will destroy the "informer's privilege" in Colorado. If an accused can present any evidence, no matter how wild or far-fetched, that an *informant* lied, the scenario that this Court feared in *McCray* will occur in almost every case in which the police have used an informant in a search warrant. The accused will demand disclosure and present some testimony to support his demand. Because the trial court will not be able to assess the defendant's good faith, that court will order the state to reveal the informer's name. If the government wishes to protect the informer's anonymity, the state will refuse to comply with this request. The court will then suppress from use at trial the evidence

seized from the accused. The accused has won, the government has lost and no Fourth Amendment principle has been furthered. In this case, the exclusionary rule has run amok.

It is indisputable that the police did not intentionally or recklessly impinge upon the defendant's constitutional rights in the case at bar. They acted in good faith. If the purpose of the exclusionary rule is to deter official misconduct, it should not have been applied to the instant case because the police did not engage in action that should be deterred. In his concurring opinion in *Gates, supra,* Justice White addressed this dilemma at 562:

> [I]t is apparent as a matter of logic that there is little if any deterrence when the rule is invoked to suppress evidence obtained by a police officer acting in the reasonable belief that his conduct did not violate the Fourth Amendment.

In the instant case, the search warrant's affidavit complied with the *Aguilar-Spinelli* test and the *Gates* standard. By satisfying those conditions, the affidavit provided the reviewing magistrate with probable cause to believe that the defendant possessed heroin. At the suppression hearing the defendant did not satisfy *Franks* or *McCray* because he conceded that the affiant's credibility was not at issue. However, even though the state followed each of the rules that this Court has established to govern cases that involve confidential informants, the Colorado Supreme Court held that the informant's name must nonetheless be revealed. If that disclosure can be obtained on flimsy evidence designed only to impeach a private person, then this Court's carefully crafted rules have been rendered meaningless and the "informer's privilege" has died.

CONCLUSION

In its decision in this case, the Colorado Supreme Court has effectively emasculated the "informer's privilege." While an accused's Fourth Amendment rights should be protected, this Court's decisions in *Aguilar, Spinelli, Gates, Roviaro, McCray* and *Franks* have established a process with which the State must comply in order to obtain a search warrant. That process not only protects an accused's privacy by assuring that the police must supply a magistrate with adequate, reliable information before a search warrant is issued, but it also permits an accused to attack that warrant, after it has been executed, by demonstrating that the government's agents lied or recklessly disregarded the truth. The opinion in this case subverts that process, and the strong public interest behind the "informer's privilege," by permitting an accused, who supplies any evidence at all, to obtain the name of an informant even when the actions of the State's representatives have not been questioned. In order to stop the erosion of the "informer's privilege" that will harshly and irrevocably cripple fair and effective law enforcement, this Court should reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

JAMES F. SMITH, District Attorney
Seventeenth Judicial District

By: /s/ James F. Smith, #3822
District Attorney

/s/ Steven L. Bernard, #8897
Chief Trial Deputy

450 South Fourth Avenue
Brighton, Colorado 80601
(303) 659-7720